2010

B.A.M. Development, L.L.C. v. Salt Lake County : Reply Brief

Utah Court of Appeals

Donald H. Hansen; Deputy Salt Lake County District Attorney; Attorney for Appellee.
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IN THE UTAH SUPREME COURT

B.A.M. DEVELOPMENT, L.L.C., a Utah limited liability company, Plaintiff-Appellant vs SALT LAKE COUNTY, a body politic and a political subdivision of the State of Utah, Defendant-Appellee	)	ORAL ARGUMENT REQUESTED Docket No. 20100923SC

APPELLANT'S REPLY BRIEF

ORIGINAL PROCEEDING IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY

The Honorable Kate A Toomey, District Judge

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IN THE UTAH SUPREME COURT

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The Plaintiff-Appellant B.A.M. DEVELOPMENT, L.L.C. [hereinafter "B.A.M. DEVELOPMENT" or simply "B.A.M."] submits the following as its APPELLANT'S REPLY BRIEF.

TABLE OF CONTENTS

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PRELIMINARY NOTE: CITATION TO/OF "BAM III" DECISION

The Plaintiff-Appellant herein continues to utilize the designation of 2008 decision of the Utah Supreme Court in this case as "BAM III". That designation---given the fact that there were two previously-reported appellate court decisions---more accurately reflects conventional nomenclature in such situations. [The COUNTY's designation of the 2008 appellate decision as "BAM II" is, for those reasons, confusing and will not be followed.]

PLAINTIFF'S REPLY ARGUMENT

In **Dolan vs City of Tigard**, 512 US 374, 114 SCt 2309, 129 LEd2d 304 (1994), the United States Supreme Court, quoting from an earlier decision, wrote:

> One of the principal purposes of the Takings Clause is **"to bar Government from forcing some people to bear public burdens which, in all**

> **fairness, should be borne by the public as a whole."**

114 SCt at 2316. Emphasis added. In this case, the Plaintiff B.A.M. DEVELOPMENT has been forced---through application of the COUNTY's "highway-abutting Ordinance"---to singularly bear public burdens (e.g. dedication and improvement costs of $391,000+ for State Road 171) which should be borne by the public as a whole. The discriminatory effect of the "highway-abutting Ordinance" is readily apparent on its face: developers of parcels adjacent to major roadways are required to sustain the full expense of dedication and improvement, while similarly-situated (but not "abutting") parcels creating the same impact are immune therefrom.

The COUNTY has filed its BRIEF OF APPELLEE, therein reciting and presenting its "costs to the governments" (or the "costs to the community") argument successfully presented to the trial court. Thus, seemingly, this "appeal" might actually appear to be an argument about what the **BAM III** decision really means, moreso than whether or not the District Court properly followed the Supreme Court's directives.

To the extent that the adduced evidence (i.e. "that the County has no costs", herein admitted within this appeal) conforms to the Supreme Court's original intentions, the case can be decided on the basis of that evidence, notwithstanding Judge Toomey's failure to follow the Supreme

Court's clear "mandate". To the extent that the Court must significantly revise its earlier announced directive as to how the case should have been tried and what the "evidence" should have been, the parties should be afforded the opportunity to have the case tried according to the correct legal standard.

The Utah Supreme Court in the **BAM III** opinion [2008 UT 74, 196 P.3d 601 (Utah Supreme Court 2008)] made it absolutely clear what the trial court was to do in the re-trial of this case. The Court wrote:

> ¶12 After determining **the cost to each party**, the final step of the extent component of the *Dolan* analysis is simple: The trial court must determine whether the **costs to each party** are roughly equivalent. FOOTNOTE OMITTED. Because each factor is measured the same way, in dollars, this calculation should be very simple. If the two sums are about the same, they are roughly equivalent.
>
> ¶ 13 With this framework in mind, applying the *Dolan* analysis becomes a relatively straightforward task. First, the trial court must determine whether the exaction and impact are related in nature---or whether the solution (the exaction) directly addresses the specific problem (the impact). Second, the trial court must determine what **the cost of dealing with the impact would be to the County, absent any exaction**; what the costs would be to the developer; and whether the two costs are roughly equivalent.

2008 UT 74 at ¶¶ 12-13. Emphasis added. Footnote in original text of Paragraph 12 has been omitted, as indicated.

At the COUNTY's insistence---following an argument similar to that advanced in Point 5 of its BRIEF OF APPELLEE (pp. 25 thereof)---the District Court did not determine

"what the cost of dealing with the impact would be to the County". [That cost (to the County) is zero.] The District Court allowed the COUNTY to present vague, rambling and conjectural evidence---through testimony of persons having absolutely no connection to the material issues of this case except as their "hired gun" status as "expert witnesses"---as what the "costs to the community" speculatively might be, at some abstract time in the future, if and when UDOT ever decides to improve the State Road 171 roadway.

PLAINTIFF'S REBUTTAL TO POINT 1
CLAIMED FAILURE BY APPELLANT TO MARSHAL TRIAL EVIDENCE

The claimed "failure to marshal the trial court evidence" is a spurious argument: a red herring intentionally calculated to divert the Court's attention from the true arguments at hand

The Plaintiff and its counsel are well aware of the appellate "rule" and legitimate judicial expectation in satisfaction thereof. The COUNTY, however, should not be rewarded for having "cluttered up" the re-trial of the case through the admission of all kinds of irrelevant evidence, and then claim a "marshaling" requirement to wade through all of that irrelevant evidence. Likewise, the Court should not---in the face of the District Court's obvious failure to abide by the Supreme Court "mandate" (to "determine costs to the County")---expect the non-prevailing party to "marshal the evidence" in support of the trial court's verdict based

upon the clearly-erroneous legal standard (i.e. "costs to the community").

Within its APPELLANT'S BRIEF the Appellant did "marshal the evidence": the evidence was and continues to be "the County has no costs". That fact---that "the County has no costs"---has been affirmatively admitted by the COUNTY's own BRIEF is now confirmed.

In his case, there is simply no evidence that the County had "costs". To the contrary, the simple fact that the "County has no costs" has been expressly admitted. For example, the COUNTY's brief states:

> Hence, while **the County has (so far) incurred no direct cost to improve the road**, the County also has received no direct "benefit" from the exaction.

BRIEF OF APPELLEE, page 21. Emphasis added.

The County's logic and argument (benefit of zero makes its "costs" to be zero) is confusing. It fails to appreciate, understand and follow the "rough equivalence" test of **BAM III** and of **Dolan**. The COUNTY's "benefit" (to the County) argument is fundamentally flawed, as the analysis and application thereof misconstrue the actual "inverse condemnation" claims of the Plaintiff: namely, that B.A.M. was unconstitutionally required (by the COUNTY) to make the $391k worth of "excessive" improvements. Whether the COUNTY received any "benefit" from the installed improvements is absolutely irrelevant to this constitutional "takings"

question. The COUNTY "forced" B.A.M. to make the dedications and improvements; if the Court's determination that those improvements and dedication were "excessive", the COUNTY should be the entity to repay those expenses.

The County asserts (p. 21) that B.A.M.'s costs are the same, whether the roadway is owned by the County or the State. That statement is not necessarily true. In any event, the description confuses the basic premise upon which Plaintiff's claims have been framed: namely, that the County's "highway-abutting Ordinance" required the full-width dedication and improvement of the State Road 171 right-of-way, when "State" requirements---actually, there were none---would not have required any exaction. [Not only did the State not have any development-based "impact fees" or exactions, but the State gets "fuels taxes" and similar revenues for such expenditures.]

That the "County has no costs" is additionally confirmed by Footnote 35 to its BRIEF OF APPELLEE (page 21), which footnote states:

> . . . Thus, BAM's repeated insistence that "the County has no costs" to widen 3500 South is misleading. **While the County may have incurred no direct costs to date**, if a future "jurisdictional transfer" devolved ownership of the road to the County, then the County would be directly burdened by the costs to widen the road when such a project takes place. In other words, **the fact that the County has not *yet* incurred direct costs to widen the road** doesn't mean it never will.

Emphasis added. Italicized words "to date" and "yet" in

original text.

The COUNTY's "jurisdictional transfer" (and Mr Nepstad's testimony and analysis based thereon) is entirely speculative and conjectural. The case has been pending for over thirteen years, and the COUNTY has not incurred a single penny of expense for the capital improvements to the State Road 171 roadway.

And regardless of the substance thereof, the discriminatory effect of the exactions imposed singularly against B.A.M. is still unchanged.

PLAINTIFF'S REBUTTAL TO POINT 2
SCOPE OF PLAINTIFF'S "INVERSE CONDEMNATION" CASE

The COUNTY continues---for its self-serving reasons---to mischaracterize the Plaintiff's substantive claims to be (erroneously) some kind of "appeal" of a "land-use" decision. That characterization has never been accurate, and it is not now accurate; any substantive effect arising from such mischaracterization is improper. This case, and the "constitutional 'just compensation'" claims made therein, is not an "appeal" of a land-use decision. This case is an "inverse condemnation" claim, for "excessive" governmental "takings" effected by the COUNTY pursuant to its "highway-abutting Ordinance". The scope and magnitude of those "takings" cannot be---and have not been---denied by the COUNTY.

The scope of the Plaintiff's claim is determined by the operational allegations of its filed complaint, not some preliminary correspondence filed with the governmental entity which refused to consider Plaintiff's claims. [The COUNTY Board of Commissioners didn't merely deny the claims. The Board refused to hear the claims.]

Likewise, the Plaintiff's initial submission of the proposed subdivision "plat" (showing the roadway improvements at the so-called "40-foot line") was done so in conformity to County administrative staff instructions and directions, in accordance with the Ordinance. Plaintiff's submission of that plat was not a waiver of his "inverse condemnation" rights (to receive "just compensation") to challenge the Ordinance.

That in the initial trial Judge Timothy Hanson made an improper evidentiary ruling is insignificant. Judge Hansen had---at the COUNTY's guidance---the entire first trial all scrambled up, and he (Judge Hansen) was reversed on appeal. That the appellate court decision---at the COUNTY's inaccurate suggestion---in preliminary dicta mischaracterized the scope of Plaintiff's claims should likewise be insignificant and inconsequential. The Court of Appeals, like Judge Hanson, "got things wrong", prompting both parties to petition for certiorari. That the Utah Supreme Court in granting certiorari, on the three narrow

issues it chose to specify, did not identify this narrow issue should be inconsequential, particularly for the COUNTY. The COUNTY had argued that the case should be remanded back to the county's hearing board (as the Court of Appeals had directed). B.A.M. had argued the "appeal" of the administrative decision (to enforce the exactions) was not a pre-requisite to litigation; on that point the Supreme Court sided with the Plaintiff. The Supreme Court ultimately directed that the case be remanded for trial, again before Judge Timothy Hanson.

The factually-inaccurate statements (ala Plaintiff appeals from the 40-foot line) contained within the appellate court's explanation of the historic background of the case are dicta; those statements were not contained within the appellate court's opinion as to its legal reasoning, nor were those statements material or relevant to the court's holding or to the issues pertinent on remand. Given the tortured history of this case, the COUNTY should not be granted an undeserved (and inaccurate) "windfall" from the factual and technical inaccuracies the COUNTY itself procured---either at trial or upon appeal---in cases ultimately resolved adversely to the COUNTY's position.

From "day One" of this situation the COUNTY, as required by its "highway-abutting" Ordinance, has required the full "53 foot" dedication and improvements. From the

filing of Plaintiff's Complaint (for "inverse condemnation"), the entirety of those "excessive" exactions has always been at issue. The COUNTY ought now be heard to complain about the size of Plaintiff's claims.

The "constitutional" (i.e. inverse condemnation claims) considerations of this case eclipse and override what might be applicable in other "administrative appeal" situations. See **Colman** and **Hansen** decisions, cited in APPELLANT'S BRIEF.

PLAINTIFF'S REBUTTAL TO POINT 3
THE COUNTY'S "COSTS TO THE COMMUNITY" ARGUMENT

The COUNTY begins its discussion [page 19 of its BRIEF OF APPELLEE] by citing the very same Paragraph 13 of **BAM III** quoted above. The COUNTY then quotes the now-infamous "Footnote #5", which the COUNTY found so objectionable when this Court's decision in **BAM III** was first issued in July 2008 and for which the COUNTY "petitioned for rehearing" to delete that Footnote #5.FOOTNOTE[1] While implicitly acknowledging that the remainder of the Court's decision in **BAM III** was unchanged and while simultaneously ignoring the otherwise precise and absolutely clear text of the unchanged provisions of Paragraphs 12 and 13 of **BAM III**, the COUNTY

[1]At the time---summer of 2008---the COUNTY argued for deletion of the Footnote because, the COUNTY claimed, the offending Footnote made it difficult for the COUNTY to talk to and coordinate with other governmental agencies. The disingenuousness of that formerly-asserted position is now obvious to all.

manufactures the "cost to the community" argument upon which its entire defense has been based.

Of course the Plaintiff B.A.M. DEVELOPMENT argues vigorously the "costs to the County" (and more specifically, the COUNTY's lack of costs) issue: this Court in **BAM III** clearly mandated such to be the focus of the trial on remand. The Supreme Court was absolutely clear in its mandate to the District Court; that the District Court failed to follow the mandate should not be grounds for the Supreme Court to do the same. The Supreme Court should follow its own "costs to the County" directive.

PLAINTIFF'S REBUTTAL TO POINT 4
"DOUBLE TAXATION" IN CONTRAVENTION TO BANBERRY

The COUNTY argues that this Court's decision in the case of **Banberry Development Corporation vs South Jordan City**, 631 P.2d 899 (Utah Supreme Court 1981), and the so-called "double taxation" argument arising thereunder, is inapplicable to the case-at-hand. The COUNTY asserts that **Banberry** involved only development "fees", for which the relevant issues were codified (and thus superseded) in the Utah Impact Fees Act, 11-36-101 et seq, Utah Code. Plaintiff vigorously disagree's with the COUNTY's self-serving, incorrect conclusion (**Banberry** is inapplicable).FOOTNOTE[2]

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[2]The COUNTY's "**Banberry** argument" (i.e. that **Banberry**'s 7-element test for compliance with the "constitutional standard of reasonableness" is inapplicable to the in-kind

Ultimately, it will be for this Court to determine the applicability---generalized or specific---to the case-at-hand. The underlying reasons for the COUNTY's position is two-fold:

1. The COUNTY, not having complied with **Banberry** in the first instance, would like to continue in that ostrich-head-in-the-sand know-nothing position.

2. The COUNTY, quite literally "on-the-ropes" for the "double-taxation" issues undeniably brought to bear in the B.A.M. DEVELOPMENT exactions, would like to avoid the application of the "constitutional standard of reasonableness" to the situation-at-hand.

The Plaintiff B.A.M. believes and asserts **Banberry** (and its 7-element criteria for compliance with the "constitutional standard of reasonableness") is undeniably applicable to this situation, for at least the following reasons:

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exactions imposed against Plaintiff B.A.M. DEVELOPMENT) is strikingly similar to the COUNTY's long-argued position that "**Dolan** is inapplicable" to the "takings" effected against Plaintiff B.A.M. Recall that the COUNTY persisted in making the "**Dolan** is inapplicable" argument even after all three judges of the Utah Court of Appeals had ruled otherwise (in **BAM I**). It was only after the Legislature had adopted legislation incorporating **Dolan**'s "rough proportionality" standard and the Utah Supreme Court had ruled in **BAM II** (that **Dolan** was applicable) that the COUNTY abandoned that frivolous argument.

1. **Banberry** was decided and written by the Utah Supreme Court not merely for the purpose of deciding the case (i.e. the "South Jordan City" litigation) then before the Court on appeal, but rather for illuminating the broader standard which would be applicable in similarly-situated cases.

2. **Banberry** was concerned not only with "fees", but also with "exactions". Indeed, the Utah Supreme Court used the both terms, even in the same sentence.

3. It makes no sense whatsoever, in articulating and developing the "constitutional standard of reasonableness", for the Supreme Court to apply the standard to "fees" but not apply the standard to in-kind exactions (such as dedications and improvements).

4. **Banberry** was understood and written for guidance in later-developing cases (almost prophetically) involving these "constitutional" issues. The 7-element test for compliance with the "constitutional standard of reasonableness" makes no sense whatsoever if "fees" are covered, but in-kind exactions (e.g. dedications and improvements) are not.

Within this narrow setting---ala the intended breadth

and depth of **Banberry**---it must be noted that **Banberry** "speaks for itself". Similarly, this Court is the ultimate arbiter of what **Banberry** means and has, since 1981, required. Likewise, the nature of this case (and more specifically, this "reply" brief) ought not be a "law review article" dissecting every word of **Banberry**.

Concededly, the predicate fact situation leading up to the Utah Supreme Court's decision in **Banberry** involved only "development fees". But that feature should not be read to restrict the Court's more expansive discussion of the relevant constitutional issues. In the opening paragraphs of **Banberry**, the Utah Supreme Court reviewed the procedural history of that specific appeal. The Court noted that both parties appealed. The Court then reviewed the then-existing Utah case law on the validity of water connection and park improvement fees. Immediately following the discussion of the four Utah appellate decisions, all of which were within the immediately-preceding decade and the last three of which were within but two years, the Utah Supreme Court wrote:

> These four decisions have resolved the legality of water connection and park improvement fees designed to raise funds to enlarge and improve sewer and water systems and recreational opportunities, as well as the legality of conditioning water hookups or plat approval on their collection. **However, these decisions leave open the question of the reasonableness <u>of any individual fee charged or land dedication required</u>. This question of reasonableness must be resolved on the facts in each particular case.** We therefore reverse both judgments and remand the

> entire case for trial on the reasonableness of the fees the city has impose in this case.
>
> Because this case is being remanded for trial, **it is appropriate for this Court to elaborate on the constitutional standards of reasonableness that should govern the validity of subdivision charges such as these.**

631 P.2d at 901-902. Emphasis added.

It is obvious from the quoted text that the Utah Supreme Court was---as in many appellate decisions---writing not merely for direction to the trial court in that case for re-trial following remand, but was writing for a broader audience and application. The **Banberry** Court recognized the "open" status of the "question of reasonableness", as per the four previously-decided opinions. Indeed, the Court expanded its description of "reasonableness" to include not only an "individual fee charged" but also a "land dedication required". Recognizing the broader purpose of its appellate decision, the Court noted the more expansive purpose of its opinion to future cases: the Court stated that "**[t]his question of reasonableness must be resolved on the facts in each particular case.**" Emphasis added. Indeed, the Court was thinking about more than the "South Jordan City case"; otherwise, the phrase "each particular case" would have no meaning, relevance, application or necessity. The Court concluded its introductory comments by elaborating upon

> "**the constitutional standards of reasonableness that should govern the** validity of subdivision charges such as these."

Id. at 902. Emphasis added. The Court utilized the phrase "subdivision charges" (not merely "fees), thus connoting a more broad scope to its announced principles: to include "land dedications" previously referred to. The Court also used the nomenclature "subdivision charges **such as these**" (emphasis added), thus implying that the announced principle had broader application: perhaps to other kinds of situations more than just "fees" or "dedications", but perhaps "in-kind improvements" of the type required against B.A.M.

The **Banberry** decision approached the two fees separately.

In addressing the water connection fee, the **Banberry** court referred to the New Jersey case, in which the Utah Supreme Court noted that "the rules **governing the allocation of improvement costs between city and developer**

> would ideally have been such as to insure, to the greatest extent practicable, that the cost of extending a municipal water facility would fall **equitably upon those who are similarly situated and in a just proportion to benefits conferred. .** . .

631 P.2d at 903. Emphasis added. Note that the Utah Supreme Court utilized the phrase "allocation of improvement costs" in a broad fashion; wording such as "fees paid" was not used. In additionally explaining the "fall equitably [and] benefits conferred" relationship, the **Banberry** opinion continued:

> Stated otherwise, **to comply with the standard of reasonableness, a municipal fee must not require newly developed properties to bear more than their equitable share of the capital costs in relation to the benefits conferred.**

Id. at 903. Emphasis added. The constitutional principle is couched in terms of "bear more then their equitable share of the capital costs": a more broad principle than merely "paying fees". "Capital costs" as a concept connotes the in-kind improvements which the COUNTY has here required and which B.A.M. installed.

Immediately thereafter---in the lead-in to the 7-element "factors" to be considered---the **Banberry** opinion continues:

> To determine **the equitable share of the capital costs to be borne by newly developed properties**, a municipality should determine the relative burdens previously borne and yet to be borne by those properties in comparison with other properties as a whole; the fee in question should not exceed the appoint sufficient to equalize the relative burdens of newly developed and other properties.
>
> Among the most important factors the municipality should consider in determining the relative burden already borne and yet to be borne by newly developed properties and other properties are the following, suggested by the well-reasoned authorities cited below:
>
> [citation of the 7 "factors", and cases]

631 P.2d at 903-904. Emphasis added.

Applied to the instant situation, "the equitable share of the capital costs to be borne by [B.A.M.]" ought to be ZERO: the same "capital costs" which are not paid by

similarly-situated (in terms of "traffic" impact), but which are not "highway-abutting". It is hardly "equitable" to force B.A.M., being "highway-abutting", to incur 100% of the expenses for the roadway dedication and improvements along the 900-foot frontage of his development, when similarly-situated developments pay nothing.

PLAINTIFF'S REBUTTAL TO POINT 5
COUNTY'S CLAIM OF "BALANCING OF COSTS"

The flaw in the COUNTY's arguments---together with its presentation of the "evidence" to the trial court, even accepted by the trial court---is that those arguments disregard the specific direction of the Supreme Court in **BAM III**, as noted above: the COUNTY has no costs.

The COUNTY's analysis of the evidence is additionally flawed in that the evidence and analysis both ignore the unconstitutional, discriminatory effect imposed upon B.A.M.: that only "highway-abutting" developers are required to incur the costs of the State Road 171 improvements.

This Court should simply answer the fundamental---even rhetorical---question which the COUNTY's "expert witness" (Mr Nepstad) simply couldn't (or wouldn't) effectively answer:

> How are the other developments, not "highway-abutting", expected to pay for the impact they create upon the State Road 171 roadway? How is it that only B.A.M. and other "highway abutting" developers have to pay?

For all of his "expert witness" status and stature---

essentially based upon the "hearsay" evidence the COUNTY told him to know---Mr Nepstad could not respond to that inquiry.

The "costs to the government" (or "costs to the community") argument is novel, but it is not what the Supreme Court directed the trial court to consider. Presumably, the Supreme Court was well aware of the fact---as required (now) by the Utah Constitution and as always directed by statute---that state "fuels taxes" and similar taxation resources are to be devoted exclusively to state roadways. [Indeed, such was probably the theoretical basis for the now famous "Footnote #5" (from the July 2008 initial version of **BAM III**), deleted by the Court in October 2008.] However, the procedural deletion of the "Footnote #5" does not---and should not---now that the "evidence is in" on that specific issue, change the Court's fundamental understanding or application of the legal principles. If those "fuels taxes" and other "taxation" revenues are paying for the UDOT-directed roadway improvements anyway, the "costs to the government" argument is very misleading and for that reason inappropriate.

The COUNTY's "cost to the government" approach, coupled with the "balancing of interests" analysis, is flawed in two major particulars:

1. The analysis (and the COUNTY's trial court

evidence) ignores the simple fact that State "fuels taxes" and other across-the-board revenues pay for State roadway improvements, including State Road 171.

2. That B.A.M., as a "highway-abutting" developer, has been unconstitutionally singled-out for disparate, discriminatory treatment (i.e. B.A.M. had to dedicate and improve: $391,000+) when other similarly-situated (i.e. same "traffic" impact) developers paid nothing, thus offending "equal protection of laws" and "uniform operation of laws" principles. All of the accounting and engineering and smoke-and-mirrors argument cannot overcome this simple fact: under the COUNTY's scheme, only "highway-abutting" developers have to pay, while everyone else gets "a pass".

The COUNTY's "benefit conferred" statements and arguments are incorrect and flawed; as such, the COUNTY's arguments evidence a complete lack of understanding of the "benefit conferred" principle applicable to this situation. The "benefit conferred" analysis does not focus "upon the COUNTY" (as the COUNTY argues, for which it received no "benefit" to the improvement of State Road 171 because it was not the owner thereof).

The "benefit" analysis falls apart due to the

discriminatory effect which has been imposed upon B.A.M.: only "highway-abutting" developers are required to make the "dedications" and the "improvements" thereto. Similarly-situated developments, creating the same "impact" but which are not "highway-abutting" are immune from any "exaction": the COUNTY has no "road impact fee".FOOTNOTE[3]

The COUNTY's seeming argument that the District Court (Judge Toomey) correctly divined the Supreme Court intent on the "ambiguity" (COUNTY's terminology) within **BAM III** is a "stretch", at best: Judge Toomey disregarded the clear, unambiguous "mandate" directive of **BAM III**.

PLAINTIFF'S REBUTTAL OF POINT 6
TRIAL COURT'S ABUSIVE REFUSAL TO HEAR PLAINTIFF'S EXPERT

The COUNTY asserts this issue not preserved in the record or properly presented in Appellant's brief. That assertion is incorrect.

The in-court dialogue between Plaintiff's counsel and the District Court (Judge Toomey) was more than adequately

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[3]Although an infinite number of hypothetical examples could be devised to illustrate the facially-obvious discriminatory effect, one example would suffice. For example, if B.A.M.'s parcel were, in north-south dimension, only four hundred feet (instead of the seven hundred feet it is), the overall "net" area for "lots" (and houses and persons) would be one-half of the former. Correspondingly, the "impact" (as defined by "traffic on the roads) would be one-half, but the "highway-abutting Ordinance" would still require dedication and improvement of the full 53-foot width.

Other hypothetical examples could be derived to achieve a "confiscatory" result.

identified and described within APPELLANT'S BRIEF. Judge Toomey had ample opportunity to rule to allow Mr Smith's "expert witness" testimony, but she refused---for "abuse of discretion" reasons---to hear that testimony.

The Plaintiff's arguments concerning the trial court's abuse of discretion in denying Mr Smith's testimony was additionally preserved within the Plaintiff's "Memorandum" in support of the "motion for new trial". These specific arguments to the trial court were presented generally at RECORD, at pp. 933-936.

CONCLUSION

The COUNTY advocated, and the District Court accepted, the incorrect jurisprudential standard to be applied in honoring the Supreme Court's mandate in **BAM III**. The "duty to marshal the evidence" in light of that incorrectly-followed standard is meaningless: doing so with only further distract us from the appropriate considerations of the case, as per the express directives of **BAM III**.

The evidence is clear: B.A.M. incurred $391,000+ in costs and expenses for the improvement of State Road 171, which---under the jurisdiction of UDOT---the COUNTY has no financial responsibility. Other similarly-situated developments (but not "highway-abutting") are required to pay nothing for their "impact".

The 7-element test for compliance with "the

constitutional standard of reasonableness" identified in Banberry is more than applicable and appropriate to this case. The "double taxation" issue---for which the Plaintiff presented unrebutted evidence (e.g. that taxes and related revenue sources pay the entirety of UDOT's budget)---is meritorious and even dispositive.

The COUNTY's analysis and evidence---based upon its flawed "costs to the community" argument (which ignores the simple truth that the UDOT revenues come from generally-paid taxes, which have paid and/or will pay for those improvements)---is fundamentally flawed. The COUNTY's evidence is speculative and conjectural. In reality, the COUNTY's arguments (to the effect that "UDOT will have these costs") actually supports the "double taxation" argument and analysis advanced by the Plaintiff.

B.A.M. having been unconstitutionally required to singularly dedicate and install $391,000+ worth of improvements to State Road 171 should be refunded the entirety of its payment.

The Supreme Court should direct the District Court to enter judgment in favor of B.A.M., in the full amount of the $391,000+, plus accrued interest thereto.

Respectfully submitted this 5th day of July, 2011.

STEPHEN G. HOMER
Attorney for Appellant

CERTIFICATE

I certify that I caused two copies of the foregoing APPELLANT'S REPLY BRIEF to be mailed to Mr Donald H Hansen, Deputy Salt Lake County District Attorney, Office of the Salt Lake County District Attorney, S-3600 Salt Lake County Government Center, 2001 South State Street, Salt Lake City, Utah 84190-1200, this 5th day of July, 2011.